ATTORNEY FOR APPELLANT:

JEFFREY D. STONEBRAKER
Chief Public Defender
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRIAN ANTHONY MCGHEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0607-CR-297
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-0406-MR-125

January 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Brian A. McGhee was convicted of Felony Murder[1] and Robbery,[2] a class A felony. McGhee now appeals, and presents the following restated issues for review:

1. Did the convictions of felony murder and robbery constitute double jeopardy?
2. Did the trial court abuse its discretion when it admitted evidence of his recorded statement?
3. Did the trial court abuse its discretion when it admitted evidence of a prior bad act?
4. Was there sufficient evidence to support the felony murder conviction?
5. Did the trial court abuse its discretion by imposing the presumptive sentence?

We affirm in part, reverse in part, and remand.

The facts favorable to the convictions are that on June 19, 2004, Q.E. and R.B. were walking near a wooded area behind an apartment building in the French Quarter Apartments (the Apartments) in Jeffersonville, Indiana. As Q.E. and R.B. approached the edge of the wooded area, they found Pierre Nash lying face down on the ground with a blue washcloth spread out across his back. Q.E. and R.B. informed Pamela Braswell, Q.E.'s father's girlfriend, and Melissa Daniels, R.B.'s mother, of their discovery. Braswell and Daniels went to the woods, confirmed the boys' story, and immediately returned to Braswell's apartment and called the Jeffersonville Police Department (the JPD).

Several minutes later, the JPD dispatcher informed Officer Isaac Parker that Nash, who was then unidentified, was found in the woods behind the Apartments, and Officer

[1] Ind. Code Ann. § 35-42-1-1(2) (West 2004).

[2] I.C. § 35-42-5-1 (West 2004).

Parker proceeded to the scene. When Officer Parker arrived, the Jeffersonville Fire Department and Emergency Medical Services (EMS) personnel were attending to Nash. Nash had been shot twice, was still alive, but was unconscious. Detective John Beury arrived at the Apartments approximately two minutes after Officer Parker. Detective Beury and Officer Parker "secured the crime scene . . . ." *Transcript* at 82. Shortly thereafter, Detectives Scott Oliver and Charles Thompson, Sergeant J. Christopher Grimm, and Corporal Brian Mitchell arrived at the Apartments. At the crime scene, personnel recovered one expended .25-caliber shell casing and a Big K Citrus Drop can, took several photographs of the wooded area, and obtained swabs of an unknown liquid located on a branch near Nash's body.

Detective Thompson and Corporal Mitchell traveled with EMS personnel when they transported Nash to Clark Memorial Hospital (the hospital). Nash, whose identity remained unknown, was pronounced dead at the hospital. At the time of his death, Nash wore a yellow, "AutoPointe" shirt, a watch, two rings, and a chain, and possessed a small amount of money and a cell phone clip, but did not have any identification. *Id.* at 129. At the hospital, Detective Thompson observed one bullet wound in Nash's head and one bullet wound in Nash's neck. Corporal Mitchell photographed Nash at the hospital. In an effort to discover Nash's identity, Sergeant Grimm contacted Paul Fetter, an AutoPointe employee. Sergeant Grimm showed Fetter a picture of Nash taken at the hospital, and Fetter positively identified Nash. Fetter stated that Nash was employed at AutoPointe and had worked on June 19, until approximately 5:00 p.m. At trial, Fetter stated that on June 19, there was between $5000 and $7000 in cash on hand at

AutoPointe, and that Nash was the only employee at AutoPointe that day. Fetter also noted that Nash did not carry a wallet, but rather "a wad of money and his driver's license in his . . . front pocket . . . ." *Id.* at 301-02.

Fetter allowed Detective Thompson and Sergeant Grimm to review AutoPointe's surveillance tapes from Saturday, June 19. The surveillance tapes revealed that Nash made several cell phone calls immediately before leaving work. Detective Thompson obtained a subpoena for Nash's phone records. After reviewing the records, Detective Thompson and Sergeant Grimm discovered there were two phone calls to and one from phone number 283-5069 prior to the time Nash left work. That phone number correlated to 1908 Village Green Apartments, apartment 151, which was leased by McGhee. Nash's phone records indicated there were approximately 40 calls made between Nash and McGhee in the five months preceding Nash's death.

On June 20, Amy Burrows-Beckham, M.D., conducted an autopsy of Nash's body. Dr. Burrows-Beckham determined Nash sustained "[m]ultiple penetrating gunshot wounds to the body." *Exhibits* at 38. That is, Nash suffered "[o]ne gunshot wound to [the] head [at] intermediate range[,]" and a second "gunshot wound to [the] posterior neck [at] indeterminate range[.]" *Id.* "Intermediate range" indicated Nash was struck by a round fired from between two and twenty-four inches away from his head. *Transcript* at 183. Dr. Burrows-Beckham believed the gunshot wound that entered Nash's head was the fatal shot, and did not believe the gunshot to the neck was a lethal wound. Dr. Burrows-Beckham could not determine which shot was fired first, how much time elapsed between the two shots, or the exact time of Nash's death.

On June 21, JPD officers located Nash's blue Mercedes in the parking lot of a church near Erica Lorenzo's, McGhee's girlfriend, apartment. Thereafter, the JPD "dispatcher call[ed] [Detective Thompson] and said that the County had received a call that there was a Brian McGhee in [the] . . . 1202 Allison Lane area, and he was there [and] he had a duffle bag with guns in it. This was an anonymous call." *Id.* at 142-43. Following the anonymous call, the JPD obtained a search warrant authorizing a search of McGhee's apartment. On June 22, Officers Todd Wilson and Jason VanGilder, Detectives Oliver and Thompson, and Sergeant Grimm executed the search warrant. When they arrived, they found McGhee and Vanessa Hopes, McGhee's other girlfriend, in McGhee's apartment. While at the apartment, Detective Thompson took McGhee aside and informed him of his *Miranda* rights. JPD personnel did not find a duffel bag or guns at McGhee's apartment.

While other officers continued to search McGhee's apartment, Detective Thompson and McGhee traveled to the Jeffersonville police station. Detective Thompson informed McGhee of his *Miranda* rights a second time and McGhee signed an "Interrogation – Advice of Rights" form (the form), which stated, in relevant part:

> You have the right to remain silent.
>
> Anything you say can be used against you in court.
>
> You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
>
> If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering any time until you talk to a lawyer.
>
> WAIVER OF RIGHTS
>
> I have read this statement of my rights and I understand what my rights are. I am willing to make this statement and to answer questions. I do not wish to have a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.
>
> s/ Brian A. McGhee

Exhibits at 111.

After McGhee signed the form, Detective Thompson interrogated McGhee for approximately two hours. McGhee initially denied knowing Nash. Detective Thompson then showed McGhee Nash's phone records, and McGhee admitted he and Nash were acquaintances. Following this interrogation, McGhee provided Detective Thompson with a taped statement. The transcript of the taped statement reads, in relevant part:

> Thompson: Okay, and how old are you?
> McGhee: I'm nineteen.
>
> * * *
>
> Thompson: Okay, and once I entered the apartment I told you I had a search warrant and I told you what . . . your rights were, that you had the right to remain silent and to have an attorney, correct?
> McGhee: Yes.
> Thompson: Okay and you understood them [sic] rights?
> McGhee: Yes.
>
> * * *
>
> Thompson: Okay. Now I didn't threaten you to come down here. I asked you about coming down here so that me and you can talk regarding the Pierre Nash incident, correct?
> McGhee: Yes.
>
> * * *

Thompson: Okay, and like I said me and you've been talking since about two-thirty and once we got down here to the office I did read you a yellow piece of paper that I'm holding in my hand entitled interrogation of rights form, correct?

McGhee: Yes.

Thompson: Okay and you did read it and sign it, correct?

McGhee: Yes.

Thompson: Okay. Now you do know an individual by the name of Pierre Nash, correct?

McGhee: Yes.

Thompson: Okay and how long have you known Pierre?

McGhee: Just like a couple of months, a few months.

* * *

Thompson: Well I want to take you back to Saturday, June the 19th. That's this past Saturday when that incident happened concerning Pierre, okay?

McGhee: Yeah (yes).

Thompson: And I showed you some phone records here where we believed he was talking to you, correct?

McGhee: Yeah (yes) he was.

Thompson: Okay and you were talking to him on the phone, correct?

McGhee: Yes.

Thompson: Okay and specifically on that date there was [sic], I think, three phone calls made on the 19th where you talked to him, correct?

McGhee: Yes.

* * *

Thompson: Okay and you had made arrangements or he did, an agreement took place where he was going to come to your apartment at 1908 Village Green, right?

McGhee: Yes.

Thompson: Okay. Now he got off right before 6:00PM on that date, correct?

McGhee: Yes.

Thompson: And you told me that after you hung up talking to him he arrived at your apartment about twenty minutes later?

McGhee: Yes.

Thompson: Okay. Now there was [sic] two other people there with you, you said. A person by the name of Ray [(Raemond Ellis)] and a person by the name of Kato[3] is that correct?

---

[3] "Kato" was believed to be "Delrico Neal". *Transcript* at 277.

McGhee: Yes.

Thompson: Okay. Now you also said that you was [sic] needing some money, straight up, right?

McGhee: Yes.

Thompson: Okay. Now somebody come [sic] up with the idea of maybe taking Pierre's money, especially since he was gay and [had] some money, right?

McGhee: Yes.

Thompson: Okay. Now, and if I say anything that's not correct, you correct me, okay?

McGhee: Okay.

Thompson: Okay, cause I don't want to put words in your mouth, right?

McGhee: Okay.

* * *

Thompson: Okay. Now a plan was pretty much formulated between you three, that when Pierre got there that you three were going to basically get his money from him, right?

McGhee: Yes, the plan was, I got first, well, we was [sic], actually we was [sic] just thinking about it and like, he didn't want to come to the hou[se], he didn't want to come in the house so he was like, ["]where's a little cut at?" Pierre was saying, "where's that, like a little cut at, low area or something", and then I started walking and the, that's when the plan started right there, cause like if we knew like if, if, we're where nobody be [sic] able to see then we was [sic] going, you know, go ahead and do what we planned and what we planned was when I, when I started walking, I fire a shot off in the air and then that'll get his attention all the way towards me and then my friend, well the dude, was suppose [sic] to smack him in his head with it, which it just turned out different.

Thompson: Okay, so you walked down the path there by your apartment into the wooded area, correct?

McGhee: Yes.

Thompson: Okay and then the plan was when you got down in there, you was [sic] going to fire a shot up in the air to get his attention?

McGhee: Yes.

Thompson: And then Kato or Ray, which one had the other gun?

McGhee: Ray.

Thompson: Ray had the other gun and you thought that he was only going to hit him with the gun?

McGhee: That's what he was suppose [sic] to have done. That's what he said he was going to do.

Thompson: Okay. But after you fired a shot up in the air did you see Ray shoot him or did you only hear the shot?

McGhee: Well, I heard the shot. I didn't see Ray shoot him, but I heard the shot and it was like a [sic] instant look back. I see him going down and Ray holding the gun in his hand, so, basically I know that he did it, ain't no other way that he couldn't of [sic].

* * *

Thompson: Okay and then what did you do?

McGhee: Soon as I seen [sic] that I just took off. . . . I . . . just ran to the house . . . I goes [sic] in the house, get [sic] my car keys, get [sic] in my car and go straight to Erica's house and I told Erica what was going on.

* * *

Thompson: Okay, and sometime or other you said somebody come [sic] to Erica's with some type of little duffle bag?

McGhee: Right, yes.

Thompson: Okay and what was in that duffle bag?

McGhee: It was the, the two guns that we had when we were down there in the woods.

* * *

Thompson: Okay. At one point you told Erica that you fired a shot into Pierre, did you not?

McGhee: Well actually I told her I did fire a shot but I didn't actually say it was in to him, like that, but I, I told her that I had fired a shot, basically was meaning, like, the way she was seeing it, was towards him, but that's what I was trying to mean, trying to impress her . . .

* * *

Thompson: Okay but [in] reality, you said you didn't, you didn't do that, you just told Erica that, correct?

McGhee: Yes, that's true.

Id. at 21-26. Simultaneously, as Thompson interrogated McGhee on June 22, other JPD officers went to Lorenzo's apartment in an attempt to locate the duffle bag that allegedly contained the weapon or weapons used to kill Nash. Lorenzo signed a "consent to search form" allowing the officers to search her apartment. *Transcript* at 155. The officers failed to find either the duffle bag or the weapons.

On either June 21 or 22, JPD officers recovered Nash's cell phone. Regina Johnson, McGhee's mother, obtained the cell phone from Dennis Sheckles, who is Johnson's uncle, McGhee's great uncle, and Ellis's father's friend, and gave it to Detective Thompson. At trial, Sheckles testified that on June 20, Ellis sold him the cell phone for $10. Sheckles further testified that Ellis did not inform him where or from whom he obtained the phone.

On June 28, 2004, the State charged McGhee with murder, felony murder, and robbery. On March 1, 2006, McGhee filed a motion to suppress the taped statement he provided Detective Thompson on June 22, 2004. Following a hearing, the trial court denied McGhee's suppression motion on March 6, 2006. A jury trial began on March 7, 2006. At trial, Officer Denver Leverett testified, over McGhee's objection, that on June 16, 2004, he received a call that gunshots were fired at the Greenwood Apartments in Jeffersonville. After traveling to the Greenwood Apartments, Officer Leverett recovered an expended .25-caliber shell casing. Officer Leverett further testified that there was a suspect in the June 16 shooting, and that it was not Ellis. Pursuant to a pretrial motion in limine, Officer Leverett was prohibited from naming the suspect. Indiana State Police Sergeant Edward Wessell testified at trial that, based upon forensic analysis, both of the bullets recovered from Nash's body were fired from the same weapon. Forensic testing also determined the expended shell casing recovered from the June 16 shooting was discharged from the same weapon as that used to kill Nash.

On March 13, the jury found McGhee guilty of felony murder and robbery, but failed to reach a verdict on the murder charge. On April 10, 2006, the trial court

sentenced McGhee to fifty-five years for felony murder and thirty years for robbery, with the sentences to run concurrently. McGhee now appeals. Additional facts will be included as necessary.

1.

McGhee contends, and the State concedes, his convictions of felony murder and robbery violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The Double Jeopardy Clause provides that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause yields three protections, including protection from multiple punishments for the same offense. *Laux v. State*, 821 N.E.2d 816 (Ind. 2005). "'[C]onviction [of] and sentence for both felony murder and the accompanying felony violate[] double jeopardy because the conviction for murder while in the commission of a felony could not occur without proof of the accompanying felony.'" *Id.* at 819 (quoting *Kennedy v. State*, 674 N.E.2d 966, 967 (Ind. 1996)).

McGhee was convicted of and sentenced for felony murder, based upon the underlying felony of robbery, and the accompanying felony of robbery. Only one murder occurred. McGhee's conviction of and sentence for the accompanying felony of robbery, therefore, violated the Fifth Amendment's Double Jeopardy Clause. We agree with McGhee that "[j]udgment of conviction should have entered, and sentence imposed, only on the greater offense." *Appellant's Brief* at 33. Accordingly, we vacate McGhee's conviction of robbery and the sentence imposed thereon. *Holden v. State*, 815 N.E.2d 1049 (Ind. Ct. App. 2004), *trans. denied*.

2.

McGhee contends the trial court abused its discretion when it denied his motion to suppress evidence of his recorded statement, arguing it was not knowingly and voluntarily made because: (1) he was under the influence of marijuana when he made the statement; (2) Detective Thompson coerced him into making a statement; and (3) Detective Thompson refused to allow him to speak with his mother before providing a statement. The State counters that McGhee waived his right to challenge the voluntariness of his statement. We will first address the State's argument.

Prior to trial, McGhee filed a motion to suppress evidence of his taped statement made on June 22, 2004. The trial court held a pretrial hearing at which the State and McGhee presented arguments. At the pretrial hearing, McGhee relied upon the three bases that he relies upon here in support of his argument that the taped statement was not voluntarily made. At the conclusion of the hearing, the trial court denied McGhee's suppression motion. McGhee did not file an interlocutory appeal challenging that determination, and he may not now challenge the ruling. *See Kelley v. State*, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005) ("[o]nce the matter proceeds to trial, the question of whether the trial court erred in denying a motion to suppress is no longer viable").

We have held that where a party does not seek an interlocutory appeal after the denial of his motion to suppress, but instead proceeds with trial, the trial court's denial of a motion to suppress is insufficient to preserve error for appeal. *Washington v. State*, 784 N.E.2d 584 (Ind. Ct. App. 2003). Rather, the defendant must make a contemporaneous objection to the admission of evidence at trial. *Id.* "If the defendant makes such an

objection and the foundational evidence is not the same as at the suppression hearing stage, the trial court must determine whether evidence is admissible based upon the testimony and evidence presented at trial." *Id.* at 586. Thus, the issue is more appropriately framed as: did the trial court abuse its discretion by admitting the evidence at trial? *Washington v. State*, 784 N.E.2d 584.

In this case, McGhee made a contemporaneous objection to the admission of the taped statement at trial. Contrary to the State's assertion, therefore, McGhee has not waived review of the admission of his taped statement. The nature of McGhee's objection, however, was general. That is, McGhee did not reargue whether his taped statement was involuntary because he was intoxicated, Detective Thompson coerced him, or he was prohibited from calling his mother. Rather, McGhee merely stated that "[w]e just ask that the [trial] [c]ourt reflect the objections made prior to the trial." *Transcript* at 151-52. Regarding such instances, we have stated:

> [t]he *Washington* court did not state that trial courts may not look back to testimony and evidence which was offered at the motion to suppress hearing. Rather, the holding was that where the foundational evidence is not the same, the trial court must make its determination based upon the testimony and evidence presented at trial. *Washington*, 784 N.E.2d at 586. Two logical conclusions flow from this. The first is that the trial court may reflect upon the foundational evidence from the motion to suppress hearing when that evidence is not in direct conflict with the evidence introduced at trial. By this we mean that trial courts may not wholly dismiss direct evidence at trial and accept evidence from the motion to suppress hearing in its place. This is related to the second logical conclusion flowing from *Washington*, when read with *Magley* [*v. State*, 335 N.E.2d 811 (Ind. 1975) *overruled on other grounds by Smith v. State*, 689 N.E.2d 1238 (Ind. 1997),] and *Joyner* [*v. State*, 678 N.E.2d 386 (Ind. 1997)] – that courts should consider evidence from the motion to suppress hearing which is favorable to the defendant and which has not been countered or contradicted by foundational evidence offered at the trial. If such were not

> allowed, the guidelines provided for in *Magley* would be a nullity. We do not think our Supreme Court went to such great lengths to provide guidance for trial courts in considering motion to suppress testimony at trial unless the [Supreme] Court intended that trial courts and courts upon appeal may include a consideration of uncontradicted evidence presented at the motion to suppress hearing.

Kelley v. State, 825 N.E.2d at 426-27 (footnotes omitted). We concluded by stating, "[c]onsequently, we will consider the foundational evidence from the trial as well as the evidence from the motion to suppress hearing which is not in direct conflict with the trial testimony." *Id.* at 427.

Finally, we note trial courts have broad discretion regarding the admission of evidence. *Kelley v. State*, 825 N.E.2d 420. Accordingly, we will reverse a trial court's ruling on the admission of evidence only when it abused its discretion. *Id.* A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* We examine the evidence most favorable to the trial court's ruling along with any uncontradicted evidence. *Matson v. State*, 844 N.E.2d 566 (Ind. Ct. App. 2006), *trans. denied, cert. denied*, ___ U.S. ___ (Oct. 30, 2006). We neither reweigh evidence nor judge witness credibility. *Id.*

In determining whether the trial court abused its discretion by admitting McGhee's taped statement, the threshold questions are whether McGhee was adequately advised of his constitutional rights by Detective Thompson, whether Detective Thompson insured that McGhee understood those rights prior to waiving them, and whether McGhee invoked his right to speak with an attorney. The State's burden under *Miranda v. Arizona*, 384 U.S. 436 (1966), is to prove that McGhee voluntarily made a knowing and

intelligent waiver of his rights. *State v. Keller*, 845 N.E.2d 154 (Ind. Ct. App. 2006). *Miranda* warnings are based upon the Fifth Amendment Self-Incrimination Clause, and were designed to protect an individual from being compelled to testify against himself. *State v. Keller*, 845 N.E.2d 154. One waives his *Miranda* rights when, after being advised of those rights and acknowledging that he understands them, he proceeds to make a statement without taking advantage of those rights. *Id.* There is no formal requirement for how the State must meet its burden of advising an individual in a manner consistent with *Miranda*, so we examine the issue in light of the totality of the circumstances. *Id.*

Miranda dictates that a person must be warned of the right to remain silent or to discontinue answering questions at any time, that his answers may be used against him, and that he has the right to the presence of an attorney, either retained or appointed. *Miranda v. Arizona*, 384 U.S. 436. Several means of sufficiently informing an individual are commonly employed by law enforcement, including a candid discussion between law enforcement and the accused regarding these constitutional rights, an oral recitation or reading of the rights to the accused followed by directly questioning whether the accused understands these rights, provision of an advisement of rights form read aloud by the accused before it is signed, or any combination of these. *State v. Keller*, 845 N.E.2d 154. A claim that *Miranda* advisements were inadequate requires that the State prove the warnings were given with sufficient clarity. *Id.*

Based upon the totality of the circumstances, we find that the trial court did not err in admitting McGhee's taped statement. McGhee's appeal is simply a request to reweigh the evidence, which we must decline. *See State v. Litchfield*, 849 N.E.2d 170, 173 (Ind.

Ct. App. 2006) ("[t]his court neither reweighs the evidence nor judges the credibility of the witnesses"), *trans. denied*. McGhee initially argues his statement was involuntary because "he was 'high' . . . ." *Appellant's Brief* at 16. Even though Hopes's testimony supported McGhee's claim that he was "smoking a marijuana blunt[4] when officers arrived with a search warrant at his apartment[,]" *id.* at 14, Detective Thompson contradicted this testimony, and the trial court was not bound to credit McGhee's testimony over Detective Thompson's testimony. *Allen v. State*, 787 N.E.2d 473 (Ind. Ct. App. 2003), *trans. denied*.

McGhee further argues that his statement was involuntary because "he was tricked or coerced into making a statement." *Appellant's Brief* at 16. The record reveals that before Detective Thompson interrogated McGhee, he informed McGhee of his *Miranda* rights at McGhee's apartment and again at the police station, and that McGhee signed a waiver indicating he knew of and understood his rights. Apart from McGhee's self-serving statements that he "felt Thompson was aware he had smoked marijuana[,]" that he "believes Thompson used his impairment to help secure a confession[,]" that he "felt the [D]etective was 'coercing' him[,]" and that he "felt pressured to acknowledge he and others had a plan to rob Nash[,]" there is no evidence that Detective Thompson in fact coerced McGhee into making the taped statement, and the record certainly does not lead inevitably to that conclusion. *Id.*; *see Marshall v. State*, 563 N.E.2d 1341, 1343 (Ind. Ct.

---

[4] A "blunt" is "a cigar that has been hollowed out and filled with marijuana[.]" Merriam-Webster, http://www.m-w.com (last visited Dec. 8, 2006).

App. 1993) ("evidence . . . [wa]s all self-serving and [did] not inevitably lead to the conclusion the guilty plea court abused its discretion").

Finally, McGhee argues that he "requested permission to contact his mother so she could retain an attorney for him prior to his questioning." *Appellant's Brief* at 20. Initially, we note that Detective Thompson refuted McGhee's assertion in this regard, and the trial court was within its discretion to credit Detective Thompson's testimony over McGhee's conflicting testimony. We further note that although police must stop questioning a suspect when he invokes his right to counsel until counsel is present or the suspect reinitiates communication and waives his right to counsel, "[i]nvocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Edmonds v. State*, 840 N.E.2d 456, 460 (Ind. Ct. App. 2006) (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)), *trans. denied*, *cert. denied*, ___ U.S. ___ (Oct. 30, 2006). "If a suspect makes a request for counsel that is ambiguous or equivocal and, if in light of the circumstances, a reasonable officer would not understand the statement to be a request for an attorney, then the police are not required to stop questioning the suspect." *Edmonds v. State*, 840 N.E.2d at 460. McGhee's, who was then nineteen years old, request to speak to his mother was not a clear and unequivocal request for counsel. Thus, the trial court did not abuse its discretion by admitting McGhee's taped statement into evidence.

3.

McGhee contends the trial court abused its discretion when it admitted evidence of the June 16 shooting over his objection, arguing the evidence constituted uncharged

misconduct prohibited by Ind. Evidence Rule 404(b). We review a trial court's decision to admit evidence for an abuse of discretion. *Ware v. State*, 816 N.E.2d 1167 (Ind. Ct. App. 2004). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* The improper admission of evidence, however, is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction. *Id.*

Evid. R. 404(b) provides, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." The well-established rationale behind Evid. R. 404(b) is the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity and, therefore, engaged in the charged conduct. *Goldsberry v. State*, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005).

In evaluating the admissibility of evidence under Evid. R. 404(b), a trial court must: (1) decide if the evidence of other crimes, wrongs, or acts is relevant to a matter other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403. *Goldsberry v. State*, 821 N.E.2d 447. Even if evidence of prior bad acts is admissible, its probative value must still be weighed against the unfair prejudice its admission may cause a defendant. *Id.*

The State argues, essentially, that the circumstances of both shootings were so similar that evidence of the June 16 shooting was admissible under the identity exception to Evid. R. 404(b). "'The identity exception to the general prohibition on propensity evidence is crafted primarily for 'signature' crimes with a common *modus operandi*. The exception's rationale is that the crimes, or means used to commit them, were so . . . unique that it is highly probable that the same person committed all of them.'" *Wilhelmus v. State*, 824 N.E.2d 405, 415 (Ind. Ct. App. 2005) (quoting *Thompson v. State*, 690 N.E.2d 224, 234 (Ind. 1997)).

Contrary to the State's assertion, these were not signature crimes. The facts of the uncharged crime and the instant offense, that is, that both victims were African-American males and allegedly homosexual, and the weapons used fired .25-caliber rounds, are not "so similar and unique in nature that it is highly probable that the same person committed [both] of them." *Browning v. State*, 775 N.E.2d 1222, 1224 (Ind. Ct. App. 2002) (evidence that the defendant approached one victim on foot without making sexual comments and physically attacked her was sufficiently dissimilar to previous uncharged crimes, in which the defendant approached the victims in a vehicle, made sexual remarks, and did not physically attack them, that the evidence was not admissible under the identity exception in Evid. R. 404(b)). The trial court, therefore, abused its discretion when it admitted evidence of the June 16 shooting.

Although this character evidence should have been excluded, the error does not warrant reversal. "'Trial court error is harmless if the probable impact of the error on the jury, in light of all of the evidence, is sufficiently minor such that it does not affect the

substantial rights of the parties.'" *Bald v. State*, 766 N.E.2d 1170, 1173 (Ind. 2002) (quoting *Hauk v. State*, 729 N.E.2d 994, 1002 (Ind. 2000)), (citations omitted). Even without evidence of the June 16 shooting, there was considerable evidence of McGhee's guilt. McGhee's own statement to Detective Thompson overwhelmingly supports his conviction of felony murder. The trial court's error, therefore, did not affect McGhee's substantial rights. *See Greenboam v. State*, 766 N.E.2d 1247 (Ind. Ct. App. 2002) (trial court's error in admitting evidence of uncharged conduct was harmless where there was overwhelming evidence of defendant's guilt, including a statement by the victim of five recent molestations), *trans. denied*.

4.

McGhee contends there was insufficient evidence to support his conviction of felony murder. When reviewing a claim of insufficient evidence, we neither reweigh evidence nor judge the witnesses' credibility. *Earlywine v. State*, 847 N.E.2d 1011 (Ind. Ct. App. 2006). We consider only the evidence most favorable to the verdict and reasonable inferences to be drawn therefrom, and determine whether there is sufficient evidence of probative value to support the conviction. *Id.* To convict McGhee of felony murder premised on robbery, the State was required to prove beyond a reasonable doubt that Nash was killed while McGhee, acting in concert with other members of the group, knowingly or intentionally took property from Nash through use of force or putting Nash in fear. *See* I.C. § 35-42-1-1(2); I.C. § 35-42-5-1. "A felony murder conviction requires proof of intent to commit the underlying felony but not of intent to kill." *Kelly v. State*, 813 N.E.2d 1179, 1183 (Ind. Ct. App. 2004), *trans. denied*. Further, our Supreme Court,

in *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999), has held that the statutory language "kills another human being while committing" does not restrict the felony murder provision only to instances in which the felon is the killer, but may also apply equally when, in committing any of the designated felonies, the felon contributes to the death of any person. *Exum v. State*, 812 N.E.2d 204 (Ind. Ct. App. 2004), *trans. denied*.

The State presented evidence that McGhee, Ellis, and Kato formulated a plan to lure Nash to the Apartments, strike him with a gun, and take his money. McGhee's taped statement details the plan:

> Thompson: Okay. Now a plan was pretty much formulated between you three, that when [Nash] got there that you three were going to basically get his money from him, right?
>
> McGhee: Yes . . . . [W]hat we planned was when I, when I started walking, I fire a shot off in the air and then that'll get [Nash's] attention all the way towards me and then [Ellis] . . . was suppose [sic] to smack him in his head with [the gun], which it just turned out different.

Exhibits at 24. During the course of the events that led to Nash's death, Nash was shot, killed, and at least his cell phone and car were taken. The evidence, therefore, was sufficient to support Nash's conviction for felony murder premised on robbery.

5.

McGhee contends the trial court "abused its sentencing discretion" when it sentenced him to the presumptive term of fifty-five years for felony murder.[5] *Appellant's Brief* at 34. It is well settled that sentencing decisions lie within the trial court's

[5] McGhee further contends the trial court abused its discretion when it sentenced him to the presumptive thirty-year term for robbery as a class A felony. We need not address that contention, however, because McGhee's conviction of and sentence for robbery violated double jeopardy. We note McGhee makes no argument based upon Ind. Appellate Rule 7(B).

discretion. *Gasper v. State*, 833 N.E.2d 1036 (Ind. Ct. App. 2005), *trans. denied*. Sentencing decisions are given great deference upon appeal and we reverse them only for an abuse of discretion. *Id.* "When the trial court imposes a sentence other than the presumptive sentence,[6] we will examine the record to insure that the trial court explained its reasons for selecting the sentence it imposed." *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006).

In this case, the trial court imposed the presumptive, fifty-five-year sentence. In doing so, it is unclear whether the trial court found substantial aggravating circumstances. At the conclusion of the sentencing hearing, the trial court stated:

> [t]here are aggravating circumstances in this particular case. There are really no mitigating circumstances that I can particularly find. But I don't know that there's a reason for me to impose aggravating circumstances or minimum circumstances to the sentence that I can impose in this case. It's clear that the sentence that should be imposed is that presumptive sentence of fifty years [sic] for the offense of Felony Murder.

Transcript at 562. In any event, the trial court did not list the aggravating circumstances it found, if any, nor did it impose a sentence other than the presumptive sentence. Accordingly, we conclude the trial court did not abuse its discretion. *See Henderson v. State*, 848 N.E.2d 341 (Ind. Ct. App. 2006) (trial court did not abuse its discretion where it identified an aggravating factor but did not afford it significant weight, did not identify any mitigating factors, and imposed the presumptive sentence).

Judgment affirmed in part, reversed in part, and remanded.

---

[6] Indiana's sentencing statutes were amended by Public Law 71-2005, sec. 7, with an emergency effective date of April 25, 2005, which altered "presumptive" sentences to "advisory" sentences. P.L. 71-2005 does not apply in this case, however, because McGhee committed the instant offense on June 19, 2004, prior to the amendment's effective date.

KIRSCH, C.J., and RILEY, J., concur.